

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1162

In The
United States Court of Appeals
For The Second Circuit

PUBLIC SERVICE MUTUAL INSURANCE CO.,
Appellant-Surety,

-and-

ANTHONY CATINO, THERESA PEDUTO, MARY
MARICCIO, and JERRY DE FEO,
Appellants-Indemnitors,

-and-

ALFRED CATINO,
Defendant,

vs.

UNITED STATES OF AMERICA,
Appellee.

JOINT APPENDIX FOR APPELLANT

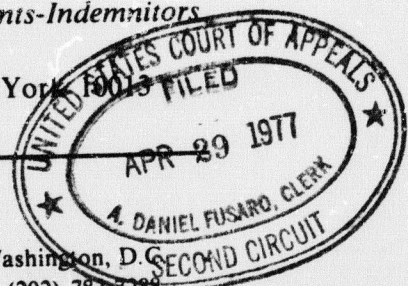
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PROCEEDINGS

CLERK'S FEES

	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
	JOHN ANGELO MALLAN Cts. 1,5,6,7		
2	VINCENT PACELLI, JR. - All Counts	1241	
3	ALFRED CATINO, ak/a Herbie -1 & 2		
4	ALFRED DE FRANCO, a/k/a Skinny - 1 & 3		
5	BARNEY BARRETT - 1	1221	
6	EMIL TORRES - 1		
7	PETER SALANARDI - 1 9-20-73 <i>ny</i>		
8	COURTLAND SAMPLE, a/k/a Bucky - 1		
9	ALBERT PEREZ a/k/a Abbe Perez -1,4,8 9-20-73 <i>ny</i>		
10	AL BRACER - 1 9-20-73 <i>ny</i>		
11	EDUARDO RAMIREZ -1 & 4 9-20-73 <i>ny</i>		
12	JACK SPADA - 1		
13	JOHN FAZZALARI, a/k/a Fuzzy -1,2,3 9-20-73 <i>ny</i>		
9-73	Deft Barney Barrett (atty present) application for reduction of bail. Granted. Bail reduced to \$10,000. cash or surety Deft remanded in lieu of reduced bail. Pollack, J.		
4-73	A. DeFranco- filed Personal Recognizance Bond secured by two deeds in the sum of \$35,000. Acknowledged by Clerk 10-1-73.		
5-73	A. DeFranco- filed remand dtd 9-27-73. Deft released from the custody of the Marshal upon posting bond as directed by the court.		
7-73	A. CATION- filed notice of appearance by Nancy Rosen, 401 B'way, NYC 925-8844.		
7-73	JOHNAT filed affdvt for writ of habeas corpus ad pros. ret: 10-19-73.		

cont'd on next page.

PROCEEDINGS

Date
Judge

Vincent Pacelli (atty present) sentence adj. to 3/5/74 in Rm. 506.
Pollack, J. mn

Filed deft B. Mallah's notice of appeal from judgment dtd 2/26/74.
Mailed copies to U.S. Atty & deft's atty.

#74,239
ALFRED CATINO- Filed JUDGMENT (atty present). Deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of TWELVE (12) YEARS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the Provisions of Title 21, Section 841, U.S. Code the deft is placed on Special Parole for a term of SIX (6) YEARS to commence upon the expiration of his confinement. It is adjudged that the deft is FINED the sum of \$25,000. to be paid or the deft is to stand committed until the fine is paid or he is otherwise discharged according to law. Deft is placed on \$50,000. bail pending appeal. Pollack, J. mn
3/4/74 Issued commitments. ent. 3/4/74

ALFRED CATINO - filed notice of appeal from judgment dtd 2/26/74.
Mailed copies to Clerk, U.S. Atty, Atty for deft.

Filed transcript of record of proceedings, dated 12/28/73; 1/2, 3, 7, 8/74.

Filed transcript of record of proceedings, dated 12/14, 20, 21, 24, 26, 27/73.

B. BARRETT-filed notice of motion for appeal pending appeal.

Filed MEMO-END. on motion dtd this date. Bail fixed at \$10,000. pending appeal, on govt's consent. and on condition that the appeal be expeditiously processed. Pollack, J., mn

BARNEY BARRETT- filed notice of appeal from judgment dtd 2/26/74.
Mailed copies to deft & U.S. Atty.

BARNEY BARRETT-filed order that leave to appeal in forma pauperis is granted. Pollack, J.

ALFRED DE FRANCO- Filed warrant of arrest of deft & return dtd: 9/26/73.

Filed deft Pacelli's motion for supplementing record.

Filed MEMO-END. on deft Pacelli's motion for supplementing record.
...Request denied. Pollack, J. mn

Filed deft Pacelli's request for findings.

Filed MEMO-END. on deft Pacelli's request for findings...request denied. Pollack, J. mn

Filed Govt's affidavit re: support of Govt's contention the deft Pacelli can be given a sentence in excess of 15 yrs. impr.

PROCEEDINGS

that certain documents in action 72 Cr 612 be transmitted to USCA as part of the record on appeal in the action 73 Cr 881. Mansfield, C.J.

Filed transcript of record of proceedings dated 2-26-74

Filed transcript of record of proceedings dated 3-15-74

Alfred Catino- Filed Remand dated 9-27-73.

Filed true copy of mandate and opinion of the U.S.C.A. (defts. B. Mallah, A. Catino, B. Barrett, & V. Pacelli, Jr.) - judgments of conviction are affirmed except for the conspiracy conviction of appellant Pacelli, which is reversed for the reasons stated (see opinion USCA) Clerk - mailed notices.

Filed deft. V. Pacelli's notice of motion re: new trial. (also docketed in 73 Cr. 105 CES and forwarded to Judge Stewart)

JACK SPADA- entered and filed nolle prosequi. Pollack, J.

A. Catino- bench warrant issued.

Benjamin Mallah and Barney Barrett- surrenders in Marshal's Office. Pollack, J.

B. Mallah- filed judgment and commitment and marshal's return, deft. delivered to F.D.H. N.Y.C. on 3-19-75.

B. Barrett- filed remand dated 3/7/75.

Filed true copy of order of the U.S. Supreme Court that the deft. V. Pacelli, Jr.'s petition for a writ of certiorari is denied. Clerk mn

Filed true copy of order of the U.S. Supreme Court that the deft. Benjamin Mallah's petition for writ of certiorari is denied. Clerk mn

Filed warrant to apprehend material witness Susan Weyl and marshal's, executed by arresting S. Weyl on 4-24-75.

Filed Govt.'s affdvt. re: opposition to deft. Mallah's motion for reduction of sentence. (see motion 73 Cr. 461)

ISMAEL TORRES and COURTLAND SAMPLES- entered and filed nolle prosequi. Pollack, J.

Al Bracer, John Fazzalari, Albert Perez, Edgardo Ramirez and Peter Salamardi- bench warrants issued as to all five defts.

PROCEEDINGS

5a

- 10-1-77 Filed deft. B. Mallah's notice of motion re: Rule 33 motion.
- 10-1-77 Filed deft. B. Mallah's memo of law re: support of Rule 33 motion.
- 10-1-77 Filed Govt's notice of motion re: judgment of forfeiture on the surety bond filed on behalf of deft. Alfred Catino.
- 10-1-77 Filed Govt's affdvt. re: opposition to deft's B. Mallah's motion pur. R33 for a new trial.
- 10-1-77 Filed Govt's memo. of law re: opposition to deft. Mallah's motion for new trial.
- 10-1-77 Filed notice of appearance on behalf of respondent Public Mutual Insurance Co. with respect to the forfeiture proceeding with regard to the surety bond posted by respondent Public Service Mutual and deft. Alfred Catino; by H. Elliot Wales 122 East 42nd St, N.Y.C. 10017 tele: (212) 682-6806.
- 10-1-77 Filed memo-end. on motion docketed 1-10-77. Motion of deft. Mallah denied. See opinion this date. Pollack, J. m/n
- 10-1-77 Filed notice of appearance on behalf of respondent-indemnitors, Anthony Catino, Theresa Peduto, Mary Maricchio and Jerry De Feo by Nancy Rosner, Esq., 401 Broadway, N.Y.C. 10013 tele: (212) 925-8844.
- 10-1-77 Filed indemnitors' memo. of law.
- 10-1-77 Filed affdvt. of counsel for Indemnitors in opposition to a motion for judgment of forfeiture of surety bond.
- 12-25-77 Filed OPINION # 45637-...Accordingly, the motion of Benjamin Mallah for a new trial is, in all respects, denied. Pollack, J. m/n
- 13-04-77 Filed deft. Benjamin Mallah's notice of appeal from judgment denying motion for reduction of sentence. m/n
- 3-02-77 ~~Filed~~ ~~memo-end.~~ of record of proceedings, dated 02-28-77
- 09-77 Filed Respondent Public Service Mutual Insurance Company affdvt of Surety.
- 09-77 Filed Respondent Public Service Mutual Insurance Company Surety Memorandum of Law.
- 19-77 Filed OPINION # 45680-...Accordingly, the government is entitled to a judgment of forfeiture of the bond of deft. Alfred Catino. Pollack, J. m/n
- 0-77 Filed memo-end. on motion docketed 2-14-77. Motion granted. See opinion 45680. See opinion filed herein 3-9-77. Pollack, J.
- 6-77 Anthony Catino - filed notice of appeal from order of 3-9-77. Mailed copies
- 77 Jerry De Feo- filed notice of appeal from order of 3-9-77. Mailed copies
- 6-77 Mary Maricchio- filed notice of appeal from order of 3-9-77. Mailed copies
- 6-77 Theresa Peduto- filed notice of appeal from order of 3-9-77. Mailed copies
- 6-77 Filed Public Service Mutual notice of appeal from order of 3-9-77. Mailed copies

United States District Court

FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Alfred Catino

No.

APPEARANCE BOND

COURT

DOCKET NUMBER

*Alfred Catino**73 CR 881*

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of *Fifty thousand* dollars (\$ *50,000*). (ON INDICTMENT 73 CR. 881)

The conditions of this bond are that the defendant is to appear before

Alfred Catino

United States Magistrate of the

~~SOUTHERN~~ District of ~~NEW YORK~~, ~~NEW YORK, N.Y.~~, and in the United States District Court for the ~~SOUTHERN~~ District of ~~NEW YORK~~ at *NEW YORK CITY*

and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the ~~United States District Court for the SOUTHERN District of NEW YORK or any other United States District Court~~ *United States District Court for the SOUTHERN District of NEW YORK*; that the defendant is not to depart

the ~~SOUTHERN~~ District of ~~NEW YORK~~ *NEW YORK* ~~nor the jurisdiction of any other United States District Court in which the defendant may be summoned or the cause transferred after he has appeared in such other district pursuant to the order of this court, except in accordance with such orders or warrants except in accordance with such orders or warrants as may be issued by~~ *the United States District Court for the SOUTHERN District of NEW YORK*

that the defendant is to abide any judgment entered in such matter by surrendering himself to serve any sentence imposed and obeying any order or direction in connection with such judgment as the court imposing it may prescribe.

If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated.

This bond is signed on this *28* day of *SEPT.* 1973

at *NEW YORK, N.Y.*

Name of Defendant

*Alfred Catino*Address. *1500 HONE AVE, BRONX*

Name of Surety, Public Service Mutual Ins. Co. Address.

393 Seventh Avenue
*New York, N.Y. 10001*by: *Charles P. Gailley*

Attorney-in-fact

Address.

Signed and acknowledged before me this *28* day of *SEPT.* 1973

Approved:

(Insert place

James P. Gailley
Asst. U.S. Attorney*James P. Gailley*
U.S. MAGISTRATE

PUBLIC SERVICE MUTUAL INSURANCE COMPANY

KNOW ALL MEN BY THESE PRESENTS: That PUBLIC SERVICE MUTUAL INSURANCE COMPANY has made, constituted and appointed, and by these presents does make, constitute and appoint.....

its true and lawful Attorney-in-Fact for it and in its name, place and stead, to execute on behalf of the said Company, as Surety, subject to the limitations as herein set forth, a criminal bail bond on behalf of

..... Name of Defendant must be inserted by Attorney-in-Fact

to be given to..... provided that the authority of said Attorney-in-Fact to bind the Company shall not in any event exceed the sum of \$.....

on any one bond and the said Attorney-in-Fact hereby authorized to insert in line six the name of the person on whose behalf this bond is given, for the sum of \$.....

IN WITNESS WHEREOF, PUBLIC SERVICE MUTUAL INSURANCE COMPANY, has caused these presents to be signed by its duly authorized officer, proper for the purpose, and its corporate seal to be hereunto affixed this 1st day of September, 1970.

Attest

PUBLIC SERVICE MUTUAL INSURANCE COMPANY



SAMUEL D. MUNNEY, Secretary

By

LEON ANISH, Vice President

RESOLVED, that the President or any Vice-President of PUBLIC SERVICE MUTUAL INSURANCE COMPANY is hereby authorized and empowered to appoint Attorneys-in-Fact with full power and authority to execute civil and criminal bail bonds on behalf of the Company, and to certify a copy of this resolution as well as a financial statement of the Company and affix the corporate seal of the Company thereunto.

RESOLVED further, that the signature of the President or any Vice-President of PUBLIC SERVICE MUTUAL INSURANCE COMPANY may be affixed by facsimile to any power of attorney, and the signature of the Secretary or any Assistant Secretary and the seal of the Company may be affixed by facsimile to any certificate of such power, and any such power or certificate bearing such facsimile signature or seal shall be valid and binding on the Company. Any such power so executed and sealed and certified by certificate so executed and sealed shall with respect to any bond to which it is attached continue to be valid and binding upon the Company.

I, Samuel D. Munney, Secretary of PUBLIC SERVICE MUTUAL INSURANCE COMPANY, do hereby certify that the foregoing is a true and correct copy of a resolution adopted at a meeting of the Board of Directors of the Company held on June 7, 1966 at which a quorum was present and voting, and that the above named Attorney-in-Fact is a duly qualified Attorney-in-Fact of PUBLIC SERVICE MUTUAL INSURANCE COMPANY and authorized and empowered to execute civil and criminal bail bonds on its behalf. I certify further that PUBLIC SERVICE MUTUAL INSURANCE COMPANY is duly and legally authorized to transact business in the States of Connecticut, District of Columbia, Florida, New Jersey, New York, and Pennsylvania and has complied with and is now complying with the provisions of the Act of Congress of August 13, 1894 and the Insurance Laws of such states and that at the date of the bond to which this Power of Attorney is attached all of the foregoing is in full force and effect.

SAMUEL D. MUNNEY, Secretary

The authority of such Attorney-in-Fact is limited to appearance bonds and cannot be construed to guarantee for failure to provide payments, back alimony payments, fines, wage law claims or any extension of credit.

NOTE

- (1) Do not accept a power of attorney which bears any alterations, erasure or interlineation.
- (2) A separate power of attorney must be attached to each bond executed.
- (3) Powers of attorney must not be returned to Attorney-in-Fact but should remain a permanent part of Court records.

AFFIDAVIT OF COUNSEL FOR SURETY
 UNITED STATES DISTRICT COURT (pp. 9a)
 SOUTHERN DISTRICT OF NEW YORK

-----X
 UNITED STATES OF AMERICA,

Docket #73 Cr. 881 (MP)

-against-

ALFRED CATINO,

: AFFIDAVIT OF COUNSEL FOR
 SURETY

Defendant,

-AND-

PUBLIC SERVICE MUTUAL INSURANCE :
 COMPANY,

Respondent.

-----X
 STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

H. ELLIOT WALES, being duly sworn, deposes and says:

I am counsel for the surety Public Service Mutual Insurance Company, and submit this affidavit in opposition to the application of the government for forfeiture of the bond in question.

I make the following offer of proof, which I am prepared to present at a hearing in this court, if it becomes necessary. Eddle Aponte has been in charge of the clerk's office, with regard to orders and appeals, the past few years. In this regard he is assisted by Michael Guranich. Both Aponte and Guranich told me that an appeal bond is a separate and distinct bond from a trial bond. An appeal bond must be executed through their office if a defendant is to be admitted to bail pending appeal. A standard form bail bond is used which differs substantially from a standard form trial bond. The procedure is that the bonding company forwards a power of attorney to

Aponte's office. Aponte and his staff then type an appeal bond, which bond must be approved by the United States Attorney. Before the bond is filed, the United States Marshal is directed to bring the defendant to the court, where the clerk then advises the defendant of the terms and conditions of the appeal bond.

Aponte and Guranich have advised me that this procedure has been followed over the years in hundreds, even thousands of cases. This is the only procedure by which a defendant may be admitted to bail, pending appeal.

It is obvious that this procedure was not followed in this particular case, and that somehow neither this Court nor the United States Attorney required defendant to post an appeal bond, in order to secure his release. It is obvious that the obligation of the bonding company in this particular bond was fully met when the defendant was sentenced.

We are prepared to produce Eddie Aponte at an evidentiary hearing, pursuant to subpoena, if it becomes necessary.

H. Elliot Wales

Sworn to before me this

18th day of February, 1977

AFFIDAVIT OF SURETY
UNITED STATES DISTRICT COURT (pp. 10a-12a)
SOUTHERN DISTRICT OF NEW YORK

10a

-----X
UNITED STATES OF AMERICA,

Docket #73 Cr. 881 (MP)

-against-

AFFIDAVIT OF SURETY

ALFRED CATINO,

Defendant,

-AND-

PUBLIC SERVICE MUTUAL INSURANCE :
COMPANY,

Respondent.
-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ABRAHAM NEWMAN, being duly sworn, deposes and says:

I reside at 70 E. 10th Street, New York City, and am the agent for the Public Service Mutual Insurance Company, which posted the bond in question.

I have been in the bonding business for more than forty years, and have posted thousands of bonds in the United States District Courts. As such I am fully familiar with the surety bonding business, and more particularly the bail bonding business. My company uses two standard form bonds in connection with federal criminal matters. One bond is used to secure the appearance of the defendant in the District Court for purposes of trial. The second standard form bond is used to assure the appearance of a defendant who has been admitted to bail, pending appeal, in the United States Court of Appeals. The language of both bonds differs.

I have written hundreds, and perhaps thousands of appeal bonds, many times involving defendants whose bond I wrote to assure their presence

at the trial in the District Court. An appeal bond is a new bond, and is not a continuation of the existing trial bond.

In the Southern District of New York the following procedure is followed. My office delivers a power of attorney to the office of the clerk of the District Court. The clerk's office has a separate section entitled "Orders and Appeals", which is staffed by Mr. Eddie Aponte and Michael Guranich. The clerk's office types the appeal bond and sends it to the United States Attorney's Office for approval. Then the clerk's office files the appeal bond after it has made arrangements with the United States Marshal to have the defendant present.

In many instances I will not write an appeal bond even though I have written a trial bond. The risk is much greater on an appeal bond, and many times I will not assume that additional risk, either with or without additional collateral. A defendant in the District Court is presumed innocent, and he knows well that even if he loses, he will still have another opportunity in the Court of Appeals. The defendant on appeal is no longer presumed to be innocent, and he knows that if he loses his appeal, he has no choice but to surrender.

My company wrote the bond in question to secure the appearance of the defendant in the District Court. He appeared for the trial and for the sentencing. I did not rewrite the trial bond, or in any way consent to its enlargement, modification, extension or change. I did not write an appeal bond for the defendant.

As far as I am concerned, I met every obligation of this particular bond by having the defendant appear for trial and for sentencing. My obliga-

tion on this particular bond ceased on February 26, 1974 when he was sentenced.

Abraham Newman

Sworn to before me this

18th day of February, 1977

TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 28, 1977
(pp. 13a-44a)

13a

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x

4 UNITED STATES OF AMERICA, :

5 vs. :

73 Cr. 881

6 ALFRED CATINO, :

7 Defendant. :

8 -----x

9
10 B E F O R E :

11 HON. MILTON POLLACK,

12 District Judge

13 New York, New York
14 February 28, 1977
10:15 a.m.

15
16 A P P E A R A N C E S :

17 ROBERT FISKE, JR., ESQ.,
18 United States Attorney

19 BY: JAMES P. LAVIN, ESQ.,
Assistant United States Attorney

20 H. ELLIOT WALES, ESQ.,
21 Attorney for Defendant

22 NANCY ROSNER, ESQ.,
Attorney for Indemnitors
23 BY: J. JEFFREY WEISENFELD, ESQ.,
24 of Counsel
25

1 jhlp

2 (Case called.)

3 MR. LAVIN: I don't see Mr. Wales here. As I
4 said, I would call him on Friday and request an extension.

5 THE COURT: Look, Mr. Lavin, you have been
6 around here long enough to know that you don't take judges
7 for granted and you don't make arrangements for adjournments
8 with lawyers. If Mr. Wales is not here that is his misfor-
9 tune.

10 MR. LAVIN: I told him I was going to request
11 an adjournment.

12 THE COURT: That still has nothing at all to
13 do with whether or not you get it. You don't get adjourn-
14 ments merely because you have been dilatory in preparing.

15 Who do you represent?

16 MR. WEISENFELD: My name is Jeffrey Weisenfeld.
17 I am from the office of Nancy Rosner. We represent the
18 indemnitors, the four people who put up the collateral upon
19 which this surety bond was written.

20 THE COURT: All right. You can go out and
21 call up Mr. Wales and tell him that this motion is set for
22 argument today and I will hear it at 11:30.

23 (Recess.)

24 THE COURT: Hello, Mr. Wales. Thank you for
25 coming in.

You can go ahead with your motion.

MR. LAVIN: Your Honor, this a motion by the Government for a forfeiture of a \$50,000 surety bond underwritten by the Public Service Mutual Insurance Company against Alfred Catino, who was convicted before this court in 1973 and who subsequent to his sentence remained out on bail on the original bond and after his conviction was affirmed or sometime after his sentence, we guess, he disappeared and still remains a fugitive. There is no question about the fact that he is a fugitive.

The surety company and the counsel for the underlying sureties themselves, the people who put up the property, claim that Mr. Catino's bail pending appeal, the continuing of that bond effectively exonerated them from any responsibility under the original District Court bond, and they cite in their papers various procedures followed in the Clerk's Office where defendants have bonds rewritten to cover appeals.

However, what is in question is the appearance bond form itself and that bond makes no mention whatsoever that its coverage is limited to the trial or to the sentence or to appeal.

Secondly, the bond itself states "That the defendant is to abide any judgment entered in such matter by

1 jhlp

2 surrendering himself to serve any sentence imposed and
3 obeying any order or direction in connection with such
4 judgment as the court imposing it may prescribe."

5 In United States v. Wray at 389 Fed. Supp.
6 1186, a Western District of Missouri case decided in 1975,
7 the Court held that identical language as I have just read --
8 I will read the quote. "Such a condition imposes upon the
9 surety a liability under the bail bond which does not ter-
10minate at the time of sentencing but continues until the
11defendant physically surrenders himself to commence service
12of his sentence."

13 I believe that language in the bond before us,
14 coupled with the fact that there is no mention whatsoever
15 that the bond is meant only to cover up to the time of
16 sentence, means, we believe it means, we insist it means,
17 this bond is still in full force and effect.

18 Further, at the bottom of this bond is the
19 statement put in by the surety company, it's on their form,
20 "It is agreed and understood that this is a continuing bond
21 which shall continue in full force and effect until such
22 time as the undersigned sureties and Mr. Catino himself are
23 duly exonerated."

24 We believe that language clearly indicates that
25 this bond, without any contrary language, covers Mr. Catino's

1 jhlp

2 disappearance and should be forfeited.

3 MR. WALES: Good morning, your Honor. Your
4 Honor, I did file answering papers. I filed an affidavit --

5 THE COURT: I have read those papers.

6 MR. WALES: My affidavit makes an offer of
7 proof, your Honor, and I am prepared to go forward with an
8 offer of proof.

9 THE COURT: Your offer to prove what?

10 MR. WALES: Your Honor, my affidavit leaves out
11 the offer of proof. I am prepared to offer Eddie Aponte,
12 who is the Deputy Clerk in the District Court in charge of
13 appeal bonds, and I am prepared to prove that Eddie Aponte
14 will testify that he has been in charge of writing appeal
15 bonds for the last seven years, that he has done it in
16 thousands and thousands of cases, that the filing of appeal
17 bond, the posting of appeal bond, is a necessary prerequisite
18 for admitting a defendant to bail pending appeal.

19 THE COURT: Say that again. He says, Judge
20 Aponte says this?

21 MR. WALES: He is prepared to testify that the
22 posting of an appeal bond, a standard form appeal bond, is
23 a necessary prerequisite for admitting a defendant to bail
24 pending appeal.

25 THE COURT: You mean I should cite Mr. Aponte

1 fhlp

2 as a judicial authority on that subject?

3 MR. WALES: You don't have to cite him like a
4 case. I am making an offer of proof evidentially, that's
5 right, and unless your Honor is prepared to hear him and
6 find that his credibility is very much at issue, without
7 your Honor hearing him, I don't think your Honor can say
8 there is no basis for what he has to say.

9 THE COURT: Is this a question of fact or a
10 question of law?

11 MR. WALES: It's both. Well, let's put it this
12 way: I am prepared --

13 THE COURT: You mean to say that Mr. Aponte
14 can vary the terms of a bond that has been filed?

15 MR. WALES: No, of course not.

16 THE COURT: Is there anything that he can say
17 that will have any impact whatsoever on the obligation
18 assumed by the surety on September 23, 1973 in the case of
19 U.S.A. against Catino?

20 MR. WALES: No, but he can testify that the
21 practice in this court that has been followed for years and
22 that has been followed by all the District Court Judges in
23 this court is that posting an appeal bond, a separate and
24 distinct appeal bond, is a necessary prerequisite for
25 admitting a defendant to bail pending appeal.

1 jhlp

2 Aponte can testify that this court uses two
3 standard form bonds, one for admitting a defendant to bail
4 pending trial and another admitting him to bail pending
5 appeal, and that has been followed in all instances,
6 thousands of cases, for the past seven years. Aponte could
7 testify to that.

8 Now, his testimony doesn't change specific
9 language of the bond, but it does give us the factual context
10 in which bonds are executed and filed and it does give us
11 the practice of the Southern District of New York and it does
12 throw light on the language of the bonds. These are standard
13 form bonds which have been approved by the court itself and
14 are used in all instances. When you have a standard form
15 appeal bond that has been approved by these judges, then that
16 is the bond to be used on appeal.

17 And so it corroborates our position that the
18 language of the District Court bond that was filed in this
19 case is solely a District Court bond and that by operation
20 of law and by its very language it is exonerated, expires,
21 on the date of sentencing.

22 Now, your Honor's language on the date of
23 sentencing was "Defendant is placed on \$50,000 bail pending
24 appeal." Fine, your Honor has the right to set the terms of
25 what the bail will be pending appeal. We have no quarrel

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2 with that.

3 However, the surety in this case never wrote
4 a \$50,000 bond pending appeal, nor did the surety in this
5 case ever consent to enlarging the terms of that District
6 Court bond, modifying it, to change it. The surety never
7 addressed itself to this particular decision that your Honor
8 made when you decided to place this particular defendant on
9 bail pending appeal.

10 THE COURT: Your argument is that he never put
11 up an appeal bond and the question that Mr. Lavin is raising
12 is that he was never exonerated under the District Court
13 bond.

14 MR. WALES: Let me put it this way: I don't
15 think Mr. Lavin's papers address themselves to this
16 particular --

17 THE COURT: That is what it means. He is
18 saying that this bond has been continuous. He just got through
19 reading a paragraph to you which is very expressive, "It is
20 agreed and understood that this is a continuing bond."

21 MR. WALES: Until such time --

22 THE COURT: Where does it say until such time
23 as the judge --

24 MR. WALES: Duly exonerated.

25 THE COURT: who exonerated this bond?

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2 MR. WALES: It was exonerated as a matter of
3 law and as a matter of contract principles when your Honor
4 imposed sentence and when your Honor -- I don't think I have
5 to make this additional thing, but I will -- when your Honor
6 made the statement "The defendant is placed on \$50,000 bail
7 pending appeal."

8 Your Honor didn't say anything to the effect
9 that -- your Honor didn't say anything that the bail bond
10 that had been posted was continued. You said the same amount
11 can be utilized. But your Honor did not address himself to
12 the question --

13 THE COURT: In other words, there is something
14 else that you haven't read to me up to now. Read the whole
15 of what was stated. I don't see --

16 MR. WALES: I have only read from the judgment.
17 I only had the judgment and the docket entries.

18 THE COURT: The judgment was prepared by the
19 Clerk and signed by the Court. You started interchangeably
20 to quote me, but you only quoted a piece of it.

21 MR. WALES: Okay. I am shown by Mr. Lavin
22 "Bail of \$50,000 is continued pending appeal on the basis
23 that defendant will proceed promptly."

24 Now, bail is the amount. Your Honor didn't say
25 bond, your Honor didn't say the existing bond. The bail, the

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2 amount is \$50,000. Fine.

3 THE COURT: Pass that up here.

4 MR. WALES: No quarrel with that.

5 This surety, your Honor, as all sureties, is
6 a commercial surety which assumes risks in return for a fee.
7 This surety assumed the risk of defendant appearing in court
8 at all stages of trial and sentencing, for which it received
9 a fee, and in order to protect itself it took certain colla-
10 teral, whatever financial steps it had to take to protect
11 its purposes.

12 THE COURT: What do you say about the case that
13 Mr. Lavin has cited, the Wray case, which you apparently have
14 cited in your brief also.

15 MR. WALES: The Wray case does not have an
16 intervening act. I haven't read the Wray case. I just
17 heard the citation for the first time.

18 THE COURT: You mean you haven't read it and
19 you cited it to me?

20 MR. WALES: The Wray case?

21 MR. WEISENFELD: I believe it's cited in our
22 brief, not in Mr. Wales' brief.

23 THE COURT: I see.

24 MR. WALES: I tell you, from what Mr. Lavin
25 quotes, and I just heard one or two sentences, we don't have

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2 an intervening act of a trial court in that matter, at least
3 from what I heard. Here in this particular case your Honor
4 specifically said "Bail pending appeal in the sum of \$50,000."

5 I think there is enough case law to the effect
6 that bonds are to be strictly construed, they are not to be
7 lightly modified. In fact, our Second Circuit in the Egan
8 case, which I referred to, said if there are going to be any
9 changes, additions, subtractions, whatever it is, remand the
10 defendant, the surety has to file a written notice, a written
11 change, it has to be done on notice to the surety, and that's
12 the way it is to be done. Of course, it wasn't done in this
13 situation.

14 Your Honor, this court has standard procedure
15 for appellate purposes and unfortunately these procedures
16 were not followed in this particular case either by the
17 Government or the court.

18 I don't think the surety should have to bear
19 the brunt for what was not done in this particular case but
20 which has been done in thousands of cases in this court, that
21 is, an appeal bond has to be filed. The surety has the option
22 of not filing an appeal bond and many times a surety will not
23 file an appeal bond, it doesn't wish to assume that risk,
24 because the risk on appeal is very, very substantially
25 different from a risk on trial. It's a greater risk.

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2 Also the surety, being in business, will not
3 file an appeal bond, will not post one, unless it is paid,
4 unless it has received a fee, which is authorized by the
5 State Insurance Department. Here no fee was paid, no bond
6 was filed, and I submit to your Honor as a matter of law
7 this bond was exonerated at the moment of sentencing, and
8 certainly when your Honor set new bail arrangements for
9 appeal.

10 THE COURT: I am a little surprised at you, Mr.
11 Wales, a man of your probity and standing at the bar, in
12 having failed to read all of the things that relate to the
13 same subject. Let me read them into the record so that we
14 have in one place a fair statement of what did occur. I am
15 talking about February 26, 1974, at the time of sentence.
16 It reads as follows, at page 8:

17 "Mrs. Rosner: May we speak to the question
18 of bail?

19 THE COURT: What is his present bail?

20 MRS. ROSNER: He is currently at large on
21 \$75,000 -- I am sorry -- \$50,000 bail, all of which is
22 secured by collateral provided by friends and relatives.
23 One such collateral is the residence of his cousin, your
24 Honor. I think it would be appropriate to note, Judge,
25 although Mr. Catino has had prior conflicts with the law,

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2 there has never been a scintilla of evidence that he is the
3 type of man prone to become a fugitive.

4 THE COURT: I take it you are talking about
5 pending appeal?

6 MRS. ROSNER: Yes, your Honor."

7 Then there was some discussion about Mr.
8 Catino's general conduct, and the Court, at page 10, reverted
9 to the subject at hand, namely:

10 "THE COURT: What is the financial condition
11 of the defendant?

12 MRS. ROSNER: He is virtually indigent. He
13 possesses no assets.

14 THE COURT: How good is that bail collateral?

15 MRS. ROSNER: It is all provided by friends
16 and relatives.

17 THE COURT: Is it realistic bail?

18 MRS. ROSNER: Mr. Catino has been in this
19 posture before. He has faced serious charges in this court-
20 house on which he was acquitted.

21 THE COURT: Is the bail realistic?

22 MRS. ROSNER: Your Honor, in my judgment, the
23 bail is more than ample.

24 THE COURT: What does the collateral consist
25 of?

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2 MRS. ROSNER: There is a residence belonging
3 to a cousin of Mr. Catino, there are life savings of several
4 other relatives and friends in the form of bank books.

5 THE COURT: How much money?

6 MRS. ROSNER: \$33,000 in cash.

7 THE COURT: In the savings bank?

8 MRS. ROSNER: From several people.

9 THE COURT: Bail of \$50,000 is continued
10 pending appeal on the basis the defendant will proceed
11 promptly."

12 That is everything that occurred at that time
13 on that subject.

14 Is there anything else that you would like to
15 say?

16 MR. WEISENFELD: Yes, quite a bit, your Honor,
17 because while I concur in most of the comments of Mr. Wales,
18 I see the posture of the case somewhat different than Mr.
19 Wales.

20 First there is the question of which law
21 applies, because there is a substantial line of federal
22 circuit cases which states that state law should be used,
23 since this is basically a contract executed in the state.

24 THE COURT: Are any of the cases that you have
25 just referred to cases since the Bail Reform Act was enacted?

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2 MR. WEISENFELD: Yes, your Honor. As a matter
3 of fact, United States versus D'Anna is 1973, and that is a
4 case that applies state law. But my personal opinion is that
5 since the Bail Reform Act and Rule 46 of the Code of Criminal
6 Procedure, plus the mere fact that the Government is consi-
7 dered to be a party in this, I personally believe that
8 federal law should apply and that those circuits which apply
9 state law are really not correctly applying state law.

10 There is another reason too. The bail bond
11 that is used in federal court materially varies in language
12 from that used in the state court. It would seem to me the
13 federal law should apply and the thrust of my argument and
14 the basis of it is really on the basis of federal law, with
15 some assistance from New York law in those areas where there
16 is some unclarity or ambiguity in the federal law.

17 However, I don't believe that the issue has
18 to be resolved that bail is exonerated when sentence is
19 pronounced. United States versus Wray as well as United
20 States versus Gonware deal with that issue. The issue that
21 arose in Wray is where sentence was pronounced and the
22 defendant asked for some time to get his affairs in order
23 and the Court granted him a stay of execution. The Court in
24 Wray and also in United States versus Gonware interpreted
25 the same language approximately as we have here as including

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2 that short period of stay to a fixed date for sentence, for
3 two reasons, not only the language of the contract, but
4 because it was common practice in the federal courts to grant
5 such stays, and from such common practice it was reasonable
6 to infer that such short period of time was considered by
7 the parties when they entered into the contract. But there
8 is no federal case saying that this short period of time
9 includes the appeal.

10 Now, there is a big break in the chain right
11 here, because to say the District Court has the power to stay
12 execution of sentence for a week or two to let a fine be
13 paid, for example, or for the defendant to get his affairs in
14 order, that matter has never left the District Court. So
15 therefore it could be said that it is still part of those
16 orders contemplated by the bail bond relating to the appear-
17 ance of the defendant.

18 But there is no case that says -- excuse me.
19 If I may back up for a minute, as a matter of fact, there is
20 a conflict in the federal cases about even that short period
21 of stay, whether it terminates the surety or not. But let's
22 assume that Wray and Gonware are correct, that the short
23 period of time for a defendant to get his affairs in order is
24 covered by the bond. There is no authority, none at all,
25 interpreting any surety contract with this language to go

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2 beyond the District Court proceedings into the appellate
3 proceedings.

4 Now, it's for this reason that Mr. Aponte's
5 testimony is in fact important to this case, because in
6 interpreting the language of the parties it is of course
7 necessary to know the usual practice to give meaning to those.

8 As pointed out by Mr. Wales, both the law in
9 New York and federal courts is that the surety contract is
10 to be strictly construed in favor of the surety. Now, in
11 interpreting what the parties intended it is essential to
12 know what the practice in the District is.

13 There has been an offer of proof which I think
14 conforms both to the case law and the practice in this
15 District that an appeal bond is a separate bond. I would
16 point out the language in United States versus Egan, a Second
17 Circuit case, which says that if there is a material modifi-
18 cation in the terms of the bond, and certainly an increased
19 risk, such as an appeal bond, and there is an increase on
20 appeal as opposed to pre-trial bail, which is further
21 reflected in the fact that getting bail pre-trial there are
22 different considerations than getting bail post conviction,
23 that this is a whole new set of risks.

24 On top of being a new set of risks, which are
25 greater than those originally contemplated, the duration of

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2 the risk is extended to a very much longer period of time,
3 also not contemplated by the parties. This was a material
4 modification of the existing bond, which by operation of law,
5 when this modification was made, terminated the surety, and
6 there is ample authority for that, going back as far as Reiss
7 versus United States, an 1869 Supreme Court of the United
8 States case, that states a material modification of a surety
9 contract terminates the responsibility of the surety.

10 Now, certainly granting or continuing a bond
11 through the appellate process is a material modification. As
12 I stated before, it increases the risk and it increases the
13 duration of the contract, and this Court, most respectfully,
14 though it had the power to set whatever conditions it wanted
15 on the freedom of Mr. Catino, could not compel corresponding
16 changes in the contract without the consent of the surety,
17 and that is the clear holding of analogous cases, both under
18 the state law and the federal law. So that I don't think
19 that the difference in law is even significant because the
20 result would be basically the same.

21 The issue, therefore, is not whether or not
22 the bond was exonerated the minute that your Honor set
23 sentence. The issue is was it exonerated when your Honor
24 changed the terms of the bond to an appeal bond. It's the
25 position of the indemnitors as well as the position of the

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2 surety that this modification had to be consented to, and
3 that is separate from the issue of whether they were notified
4 about this modification.

5 Even if they were notified, they have to con-
6 sent to it, it's a new contract, and without due notice, and
7 here we say no due notice was given to the surety or the
8 indemnitors, the changing of these material rights would be
9 a violation of due process, because it does affect the
10 property of the indemnitors, which had to remain pledged
11 through the appeal process, it affected the assets of the
12 surety for a longer duration than contemplated, and to do
13 this without proper notice is in fact a taking of a right or
14 a taking of property that violates due process of law.

15 I think the cases are very clear about one
16 thing.

17 THE COURT: Where is the language in the bond
18 that fixes the termination of the bond, the duration of the
19 bond?

20 MR. WEISENFELD: Yes, your Honor. We under-
21 stand that it is agreed and understood that the language is
22 that this is a continuing bond until the undersigned are
23 duly exonerated. That means it continues through the District
24 Court proceedings. It does not mean that this Court has the
25 power to impose an appeal bond on an unwilling surety when

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2 the District Court proceedings are terminated by the filing
3 of a notice of appeal, as in U.S. versus Ellenbogen.

4 THE COURT: Let me ask you this question: what
5 language do you rely upon for your -- and I say this without
6 meaning any offense -- self-serving assertion that the Court
7 changed the terms of the bond and that the Court exonerated
8 the sureties and the collateral after the conversation that
9 I have read to you from Mrs. Rosner with the Court? Where
10 did I say that those sureties, those people, the cousins and
11 the sisters and the aunts, were now being relieved?

12 MR. WEISENFELD: Your Honor, we say that you
13 did not say that, but that when you made this an appeal bond
14 that that was --

15 THE COURT: Where do I make it an appeal bond?

16 MR. WEISENFELD: You said it's continued
17 through the appellate process, and that is a bond pending
18 appeal.

19 THE COURT: Isn't it necessarily continued
20 through an appellate process if it's a continuing bond until
21 such times as it is exonerated?

22 MR. WEISENFELD: No, your Honor. It is a
23 continuing bond through the District Court proceedings.

24 THE COURT: It doesn't say that, does it?

25 MR. WEISENFELD: Yes, it does, your Honor,

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2 because the rule of interpretation of this type of contract
3 is that you look at the contract as a whole to determine the
4 intentions of the parties, and this document is clearly
5 geared to the District Court proceedings, no matter what
6 paragraph you take out of context.

7 THE COURT: Let me pose this question to you,
8 a situation that is not unknown in this District:

9 The defendant is convicted and on the day of
10 sentence he takes off and becomes a fugitive. Is the bond
11 still in existence?

12 MR. WEISENFELD: Before the District Court has
13 given up jurisdiction, before sentence?

14 THE COURT: The defendant is convicted and he
15 is sentenced and immediately upon learning his sentence the
16 defendant takes off and disappears, becomes a fugitive. Has
17 the bond been exonerated?

18 MR. WEISENFELD: If I may, just to clarify,
19 you mean he is in court, he is sentenced, and he jumps out
20 the window and runs away, is the bond exonerated?

21 THE COURT: He just walks out of the courtroom
22 and says --

23 MR. WEISENFELD: I would say that under the
24 interpretation of Gonware and Wray that there is a possible
25 interpretation that it does not exonerate the minute that

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2 sentence is pronounced.

3 THE COURT: All right. Stop there. So he
4 disappears and his lawyer within ten days, in the protection
5 of his interests, starts a notice of appeal. Has the bond
6 been exonerated?

7 MR. WEISENFELD: Has the bond been exonerated?

8 THE COURT: Yes.

9 MR. WEISENFELD: No, your Honor. Let's say --

10 THE COURT: The Court of Appeals then goes
11 through its meditations and decides to affirm and sends back
12 the mandate to the District Court, saying to the District
13 Court "You may go ahead with your judgment." Has the bond
14 been exonerated?

15 MR. WEISENFELD: I think a reasonable argument
16 can be made that it has not. However, that is apples and
17 oranges with the situation here, because the defendant did
18 not run away prior to a substantial modification of the terms
19 of the bond.

20 THE COURT: I know, but you see, what you keep
21 referring to as a substantial modification of the terms of
22 the bond just didn't happen, except in your mind.

23 MR. WEISENFELD: Judge, this bond was continued
24 through the appellate process. From the terms of those
25 minutes the defendant was not required to post any other bond

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2 until his appeal was determined.

3 THE COURT: That's right. No additional bond
4 was imposed upon him, no additional bond was imposed upon
5 him in connection with the appeal.

6 MR. WEISENFELD: You are saying that --

7 THE COURT: Let's look at the bond here. You
8 seem to have studied this out. Of course, there is a very
9 significant case that you don't cite in your memorandum,
10 which I will come to in a moment.

11 This bond says "The conditions of this bond are
12 that the defendant Alfred Catino is to appear in the Southern
13 District of New York at New York City in accordance with any
14 and all orders and directions relating to the defendant's
15 appearance in the above entitled matter as may be given or
16 issued by the United States District Court for the Southern
17 District of New York."

18 MR. WEISENFELD: May I interrupt at this point,
19 because I would like to make an argument on the basis of this
20 language.

21 THE COURT: Yes.

22 MR. WEISENFELD: If a defendant goes through
23 an appeal it is the order of the Second Circuit that returns
24 him to this Court. The mandate of the Second Circuit must
25 issue compelling him to come back and until that mandate

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2 issues this Court cannot order his surrender.

3 THE COURT: All you are saying is that the hand
4 of the District Court is stayed, but not wiped out. The hand
5 of the District Court is stayed pending appeal.

6 MR. WEISENFELD: And it requires an order --

7 THE COURT: It's just like an injunction
8 against anybody. That doesn't mean that the lawsuit is
9 terminated because you are enjoined during the pendency of a
10 certain condition from taking certain action. That doesn't
11 mean that once the injunction is lifted that you can't take
12 that action.

13 Let's go on here for a minute. It says here
14 "That the defendant is to abide any judgment entered in such
15 matter by surrendering himself to serve any sentence imposed
16 and obeying any order or direction in connection with such
17 judgment as the court imposing it may prescribe."

18 Then here are the conditions on which the bond
19 is exonerated. "If the defendant appears as ordered and
20 otherwise obeys and performs the foregoing conditions of this
21 bond, then this bond is to be void."

22 There is nothing in there that says if the
23 defendant appeals this bond is void.

24 It continues, saying "but if the defendant
25 fails to obey or perform any of these conditions, payment of

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2 the amount of this bond shall be due forthwith. Forfeiture
3 of this bond for any breach of its conditions may be
4 declared by any United States District Court having cogni-
5 zance of the above entitled matter at the time of such
6 breach and if the bond is forfeited and if the forfeiture
7 is not set aside or remitted, judgment may be entered upon
8 motion in such United States District Court," et cetera, et
9 cetera.

10 Then comes the all embracing language, "It is
11 agreed and understood that this is a continuing bond which
12 shall continue in full force and effect until such time as
13 the undersigned are duly exonerated."

14 Now, the bond happens to fall precisely within
15 the language of Form 17 prescribed by the Federal Rules of
16 Criminal Procedure", with the exception that the form in
17 Form 17 does not carry the significant additional clause that
18 the bond is a continuing bond, which has been read to you, as
19 nearly as I can make out, and in that regard the case that
20 you didn't cite and that isn't referred to by Mr. Wales, or
21 even by the Government, for that matter, is United States
22 against Miller decided in 1976 in 539 F. 2d445, which says
23 that state law doesn't govern in questions concerning bail
24 and that any cases that look to state law have now been
25 obsoleted by the Bail Reform Act procedures, and I am quoting,

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2 "Procedures and conditions for admission to bail in federal
3 courts and for revocation, modification and so on, are now
4 governed by the Bail Reform Act of 1966, 18 USC Section 3141,
5 et seq. Forfeiture and exoneration are controlled by Sections
6 (e) and (f) of Rule 46 of the Federal Rules of Criminal
7 Procedure."

8 MR. WEISENFELD: Excuse me, your Honor. Is
9 that --

10 THE COURT: Just let me finish and then we will
11 give you a chance to say anything you want.

12 (e) (1) relates to a declaration of breach of
13 condition, (2) relates to setting aside a forfeiture, (3)
14 has to do with enforcement of the terms of the bond, and (4)
15 has to do with remission.

16 (f) relates to exoneration, which reads in its
17 entirety "When the condition of the bond has been satisfied
18 or the forfeiture thereof has been set aside or remitted the
19 court shall exonerate the obligors and release any bail."

20 Plainly, no such events have occurred here and
21 the condition of the bond has not been satisfied, nor has
22 the forfeiture thereof been set aside or remitted, so as to
23 require that the court shall exonerate the obligors and
24 release the bail.

25 Now, in United States against Wray the Court

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2 held that pronouncement of sentence does not exonerate the
3 surety, who remains liable thereafter.

4 The issue as to practice that has been sug-
5 gested cannot override the plain language of the bond, any
6 more than could a court attach new conditions to the colla-
7 teral or to the surety. The fact of the matter is that there
8 was no unilateral alteration of the conditons of the bond by
9 the court and there was no requirement of additional bail on
10 appeal by the defendant or his surety or the collateral for
11 that surety, and the court did not change the terms or vary
12 in the slightest the express language of the appearance bond
13 for Alfred Catino.

14 This bond continues to operate and continued
15 to operate until such time as the surety was exonerated, and
16 that event seems not to have occurred.

17 Now, the mere fact that you can cite to me a
18 practice of a Deputy Clerk that an appeal bond is a separate
19 bond merely means to me that if an appeal bond had been
20 ordered here instead of the discussion of whether the colla-
21 teral as it was posted was sufficient to hold the defendant
22 and was actual collateral if an appeal bond had been
23 ordered, presumably if there had been a breach of that condi-
24 tion Mr. Catino would have been picked up by the United
25 States Attorney's office and the matter would have come to a

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2 very sharp focus.

3 Very frequently when a bond is posted at the
4 District Court level and a conviction has been secured the
5 Court will change the value of the bail by requiring addi-
6 tional security pending appeal. However, in this case, on
7 the earnest protestations of Mrs. Rosner in the circumstances,
8 no additional collateral was required.

9 At all events, the matter is an interesting one
10 and certainly deserves full consideration by the Court, and I
11 will, accordingly, reserve decision.

12 MR. WEISENFELD: Your Honor, may I inquire
13 whether Miller is a Second Circuit case?

14 THE COURT: Miller is a Fifth Circuit case.

15 MR. WEISENFELD: In any event, I would just
16 point out that while Miller is not cited independently, we
17 rely on the same conclusion, that federal law should apply.

18 THE COURT: Yes.

19 MR. WEISENFELD: The only thing further that I
20 would like to point out, your Honor, is that it's obvious
21 that the Wray case, that the Gonware case, that the issue
22 there was whether or not the District Court had the power to
23 extend the District Court proceedings for a short period of
24 time, and that all of the language used in those cases
25 relates to this short period, to a fixed time, and those cases

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2 rely on the practice in the District for their finding that
3 this was contemplated by the parties, that there is no
4 federal case --

5 THE COURT: Contemplation by the parties
6 relates to ambiguity and does not relate to express conditions.

7 I could no more impose additional terms on the
8 surety because it's contemplated in the District than I can
9 to subtract terms from the bond on the ground of contempla-
10 tion. There has been no reformation of the terms of this
11 bond.

12 MR. WEISENFELD: It is interesting to note,
13 however, with the number of cases that have dealt with the
14 issue of when the surety ends through a change in condition
15 or modification, there is not one case holding that holding
16 the bond through the appeal is appropriate.

17 THE COURT: There is always a first time to
18 correct obvious error, if, indeed, it be. I don't know. I
19 am reserving decision.

20 MR. WALES: Your Honor, may I be heard just for
21 a couple of minutes?

22 THE COURT: Yes.

23 MR. WALES: Thank you. My offer of proof, your
24 Honor, through Eddie Aponte, is not just with regard to the
25 practice of the Clerk's office. It is with regard to the

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2 practice of this Court, because a bond, an appeal bond, is
3 posted with the Magistrate, who is a judicial officer of the
4 District Court, and he has to approve --

5 THE COURT: I don't think you ought to burden
6 yourself with discussing Mr. Aponte or a practice that
7 relates to unequivocal, unambiguous expressed language in an
8 instrument of undertaking.

9 I will hold for your peace of mind ultimately
10 that it is irrelevant to determine what Mr. Aponte can say,
11 and I will also hold that Mr. Aponte's views cannot be cited
12 to me as judicial caveat.

13 MR. WALES: But let me be heard, because maybe
14 I am wrong, but it may well be that another Court on another
15 day will have to decide, your Honor, whether I am right or I
16 am wrong, and I want the offer of proof to be clear that I
17 haven't waived anything.

18 I make an offer of proof that Aponte will
19 testify to the practice of this Court, which includes what
20 the Magistrates do when they accept the posting of bond.

21 THE COURT: I am sorry. Mr. Aponte cannot
22 speak for this Court.

23 MR. WALES: Aponte will also testify --

24 THE COURT: Mr. Aponte can merely talk as an
25 observer and give his impressions, but it would be new doctrine

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2 to say that he can speak for what the practice is of the
3 judges and what is in their mind when they act and what was
4 in my mind, with the express expression as I have read it to
5 you in detail, which apparently you were not familiar with
6 at the outset of your argument.

7 MR. WALES: Your Honor, I haven't offered
8 Aponte's testimony as to what subjective intent was in your
9 mind.

10 One other thing, your Honor. You asked Mr.
11 Weisenfeld about what happens if the defendant absconds at
12 the moment of sentencing, if the Court were to impose sen-
13 tence, the defendant walks out, and I would give a different
14 answer than he would. I would say at the moment of sentencing
15 the defendant has surrendered to the jurisdiction of the
16 Court, the surety has done what he can in producing him
17 there. If the Court allows him or makes it possible for him
18 to walk out of the courtroom without surrendering, let's say
19 not having United States Marshals here, I submit that would
20 be the fault of the District Court, it would not be the
21 responsibility of the surety.

22 United States Marshals are the agents of the
23 District Court, to be utilized for purposes of surrender and
24 other purposes, and if the Court, having the defendant here,
25 lets him walk out, I would say the surety is not at fault at

1 jhlp

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44a

2 all.

3 THE COURT: All right. I think I have your
4 point. Thank you very much, gentlemen.

5 MR. WEISENFELD: Excuse me. For the record --
6 it will take me twenty seconds -- I just want to clarify.
7 I just think it's an open question whether or not when a man
8 surrenders himself for sentence and the Court says "You are
9 sentenced to x number of years," whether or not at that
10 moment bail is exonerated. There is some question whether or
11 not the Court can extend it for some short period after that,
12 but I am not conceding that this would continue beyond the
13 District Court proceedings.

14 THE COURT: Thank you very much.

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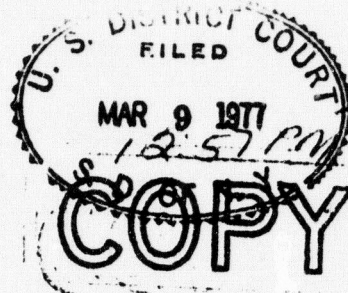
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OPINION FILED MARCH 9, 1977 (POLLACK, J.)
(pp. 45a-55a)

45a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
UNITED STATES OF AMERICA :

v. :

ALFRED CATINO, :

Defendant. :

73 CR. 881 (MP)

45680

-----X
DECISION

APPEARANCES:

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007
By: James P. Lavin, Assistant U.S. Attorney

H. ELLIOT WALES, ESQ.
Attorney for Respondent (Public Service
Mutual Insurance Company)
122 East 42nd Street
New York, N.Y. 10017

NANCY ROSNER, ESQ.
Attorney for Indemnitors (Anthony Catino,
Theresa Peduto, Mary Mariccio, Jerry De Feo)
401 Broadway
New York, N.Y. 10013
By: J. Jeffrey Weissenfeld, Esq.

MILTON POLLACK, District Judge.

Milton Pollack, District Judge.

The government moves pursuant to Fed. R. Crim P. 46(e)(1), (3) for a judgment of forfeiture of a \$50,000. bail bond posted to obtain release from confinement of Alfred Catino pending criminal proceedings against him pursuant to an indictment charging violation of federal narcotic laws. Following his trial, conviction and unsuccessful appeal therefrom, Catino jumped bail and has since remained a fugitive from justice. Catino's surety and the indemnitors who collateralized the bail bond oppose the motion contending that the appearance bond was exonerated upon pronouncement of sentence following conviction or was exonerated by continuance of bail status of Catino pending appeal without the consent of the surety.

The motion for a judgment of forfeiture is granted for the reasons appearing hereafter.

Alfred Catino was indicted on September 20, 1973. Upon his arraignment bail was fixed at \$50,000. and he was released from custody when the Public Service Mutual Insurance Company posted its surety bond in that amount

dated September 28, 1973. Catino was tried and convicted by a jury on January 8, 1974 and sentenced on February 26, 1974 to two concurrent twelve year prison terms to be followed by a six year term of Special Parole. His counsel announced intention to appeal and after ascertaining the apparent moral strength that could be exerted on Catino by the indemnitors of the surety company, all of whom are Catino's friends and relatives who posted life savings, bank books and a residence belonging to his cousin, the then posted bail of \$50,000. was not exonerated or increased pending appeal on the basis that defendant would proceed promptly.^{1/} Catino remained at large on the strength of the September 28, 1973 surety bond during the test of his conviction by appeal. Following affirmance of the judgment by the Court of Appeals, Second Circuit, the government obtained an order for Catino's surrender on March 17, 1975; he did not comply therewith and has never been apprehended and remains a fugitive.

1/ Mrs. Rosner: May we speak to the question of bail?
The Court: What is his present bail?

1/ Continued:

Mrs. Rosner: He is currently at large on \$75,000 -- I am sorry, \$50,000. bail, all of which is secured by collateral provided by friends and relatives. One such collateral is the residence of his cousin, your Honor.

I think it would be appropriate to note, Judge, although Mr. Catino has had prior conflicts with the law, there has never been a scintilla of evidence that he is the type of man prone to become a fugitive.

The Court: What is the financial condition of the defendant?

Mrs. Rosner: He is virtually indigent. He possesses no asset.

The Court: How good is that bail collateral?

Mrs. Rosner: It is all provided by friends and relatives.

The Court: Is it realistic bail?

Mrs. Rosner: Mr. Catino has been in this posture before. He has faced serious charges in this courthouse on which he was acquitted.

The Court: Is the bail realistic?

Mrs. Rosner: Your Honor, in my judgment the bail is more than ample.

The Court: What does the collateral consist of?

Mrs. Rosner: There is a residence belonging to a cousin of Mr. Catino. There are life savings of several other relatives and friends in the form of bank books.

The Court: How much money?

1/ Continued:

Mrs. Rosner: \$33,000 in cash.

The Court: In the savings bank?

Mrs. Rosner: From several people.

The Court: Bail of \$50,000 is continued
pending appeal on the basis that defendant will
proceed promptly.

Mrs. Rosner: We shall your Honor.

The terms of the bail bond are set out in the Appendix hereto.

It seems beyond cavil that Catino's failure to surrender to begin serving his sentence as ordered following the denial of his appeal was a breach of the conditions of the bond. The surety argues that it was exonerated upon pronouncement of sentence, while the indemnitors assert that the sentencing court's release of Catino pending appeal subject to the September 28, 1973 bond was an exonerating modification thereof.^{2/}

The instant motion appears to raise a novel question in the federal courts.^{3/} Its resolution, however, is facilitated by the express stipulation in the surety bond that

^{2/} The surety and indemnitors made an offer of proof that it is the practice of the deputy clerk of the District Court to use separate trial and appeal bond forms. Whatever practice is thus involved does not control or change the express terms of this bond.

^{3/} In view of the pervasive federal regulation of federal bail procedures and conditions, see The Bail Reform Act of 1966, 18 U.S.C. § 3141 et seq.; Fed. R. Crim. P. 46, the interpretation of the bail bond here at issue is a matter of federal law. Accord: United States v. Miller, 539 F.2d 445 (5th Cir. 1976).

"It is agreed and understood that this is a continuing bond which shall continue in force and effect until such time as the [surety is] duly exonerated," a provision not found in Illustrative Form 17 (Appearance Bond), Appendix of Forms, Fed. R. Crim. P.

The notion of exoneration has been extensively explored in cases concerning the liability of a surety whose principal absconds after sentencing during a postponement of execution of the sentence. It has been held that "there is no per se federal rule that the pronouncement of sentence exonerates a surety," United States v. Miller, 539 F.2d 445, 449 (5th Cir. 1976), and that when, as here, "the bond states that the principal is to surrender himself for execution of the sentence and to abide by orders of the court in connection with a judgment, the pronouncement of sentence does not exonerate the surety...." 539 F.2d at 448. See also United States v. Gonware, 415 F.2d 82 (9th Cir. 1969);

United States v. Wray, 380 F. Supp. 1186 (W.D. Mo. 1975). ^{4/}

The agreement expressed that the instant bond is a continuing one. This refutes the indemnitors' "modification" argument, because the bond by its terms was to remain in force until exoneration and production of a principal for sentencing does not constitute exoneration.

^{4/} But see United States v. D'Anna, 487 F.2d 899 (6th Cir. 1973) (under Michigan law, sentencing terminates surety's obligations).

In People v. Bowles, 280 App. Div. 476, 114 N.Y.S. 2d 353 (4th Dept. 1952), the Court stated that "bail given after indictment expired upon judgment of conviction and the sureties were exonerated when the defendant appeared for judgment and rendered himself in execution thereof." 114 N.Y.S. 2d at 359 (dictum). Subsequent New York cases are in conflict. Compare People v. Public Service Mutual Ins. Co., 49 Misc.2d 875, 268 N.Y.S.2d 624 (Sup. Ct., Special Term, New York County 1966) and People v. Public Service Mutual Ins. Co., 40 Misc. 2d 341, 243 N.Y.S. 2d 256 (Sup. Ct., Crim. Term, Kings County 1963) with People v. Public Service Mutual Ins. Co., 39 Misc. 2d 488, 240 N.Y.S. 2d 815 (Sup. Ct., Crim. Term, Kings County 1963).

By the express terms of the instrument payment of the amount of the bond became due upon Catino's failure to surrender when ordered by the District Court. Leaving the bond effective during the period of the appeal was no modification thereof; pursuant to the continuing bond provision the bond remained in force in the absence of some prior act of exoneration.^{5/}

The surety and indemnitors seek to distinguish Miller, Gonware, and Wray on the ground that because of the common practice of granting temporary stays of execution of sentence the parties to a bail bond may be deemed to have contemplated that it would continue in force

^{5/} Fed. R. Crim. P. 46(f) provides that "When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody." In the present case there was no timely surrender of Catino into custody, and no cash deposit. The colloquy following sentencing quoted above demonstrates that the Court did not exonerate the obligors or release the bail, and Miller, supra, holds that it was not required to do so.

during a limited stay, whereas their proffered proof that it is the practice of this Court's deputy clerks to use separate trial and appeal bond forms would demonstrate that the parties did not contemplate that the bond would remain effective pending appeal. That distinction might be significant, if this Court were required to ascertain the intended duration of the instant bond from ambiguous language or by inference. Here, however, the bond explicitly stated that it was to remain effective until the surety was exonerated, and there was no exonerating act prior to the principal's violation of the bond's conditions.

Accordingly, the government is entitled to a judgment of forfeiture of the bond.

SO ORDERED.

March 9th, 1977

Milton Pollack
U.S. District Judge

Appendix

The conditions of this bond are that the defendant ALFRED CATINO is to appear in the United States District Court for the Southern District of New York at New York City, and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the United States District Court for the Southern District of New York; that the defendant is not to depart the Southern District of New York except in accordance with such orders or warrants as may be issued by the United States District Court for the Southern District of New York; that the defendant is to abide any judgment entered in such matter by surrendering himself to serve any sentence imposed and obeying any order or direction in connection with such judgment as the court imposing it may prescribe.

If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated.

FEDERAL COURT-SECOND CIRCUIT

PUBLIC SERVICE MUTUAL INSURANCE CO.,
 Appellant-Surety,
 - and -
 ANTHONY CATINO, THERESA PEDUTO, MARY MARICCIO, and
 JERRY DE FEO, Appellants-Indemnitors,
 -and-
 ALFRED CATINO,
 Defendant,
 -against-
 UNITED STATES OF AMERICA Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

SS.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the 29th day of April 1977 at 1 St. Andrews Plaza
 N.Y. N.Y.
 deponent served the annexed Appendix & ~~FILE~~
 Robert Fiske Jr. U.S. Attorney

2) 401 Broadway NYC
 2) Jeffrey Weissfeld

the Appellee in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorney herein.

Sworn to before me, this 29th
 day of April 1977

Reuben A. Shearer

Reuben A. Shearer

ROBERT T. BRIN
 NOTARY U.S.C. State of New York
 No. 31 0418950
 Qualified in New York County
 Commission Expires March 30, 1979